United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1151,52

To be argued by
PETER B. CASEY, III

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 75-1151, 75-1152

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK MESSENGER and RONALD DISTASSIO,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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Citation of Statutes

18 U.S.C. §2

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. As amended Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.

18 U.S.C. § 891

For the purposes of this chapter:

(1) To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

(2) The term "creditor", with reference to any given extension of credit, refers to any person making that extension of credit, or to any person claiming by, under, or through any person making that extension of credit.

(3) The term "debtor", with reference to any given extension of credit, refers to any person to whom that extension of credit is made, or to any person who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that extension of credit is made to repay the same.

(4) The repayment of any extension of credit includes the repayment, satisfaction, or discharge in whole or in

part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

(5) To collect an extension of credit means to induce in any way any person to make repayment thereof.

(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(8) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and territories and possessions of the United States.

(9) State law, including conflict of laws rules, governing the enforceability through civil judicial processes of repayment of any extension of credit or the performance of any promise given in consideration thereof shall be judicially noticed. This paragraph does not impair any authority which any court would otherwise have to take judicial notice of any matter of State law.

Added Pub.L. 90-321, Title II, § 202(a), May 29, 1968, 82 Stat. 159.

18 U.S.C. §894

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in section 892(b) (1) or the circumstances described in section 892(b) (2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom he alleged threat was made was a member at the time of the collection or attempt at collection.

Added Pub.L. 90-321, Title II, § 202(a), May 29, 1968, 82 Stat. 161.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 75-1151, 75-1152

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK MESSENGER and RONALD DI STASSIO,

Appellants.

BRIEF FOR THE APPELLEE

Statement of the Case

On April 9, 1974 a federal grand jury at Hartford, Connecticut returned a two-count indictment against Frank Messenger and Ronald DiStassio alleging the use of extortionate means to attempt to collect an extension of credit in violation of Section 894 of Title 18, United States Code. The grand jury alleged, in Count One, that on or about March 1, 1973 Ronald DiStassio had, over the telephone, threatened the use of violence in attempting to collect an extension of credit from the debtor, John Alicki. The grand jury alleged, in Count 2, that on or about October 4, 1973 Ronald DiStassio and Frank Messenger had used extortionate means to attempt to collect an extension of credit in that they had set fire to the debtor's car. On April 10, 1974 bench warrants for the defendants were issued. On April 10, 1974 Ronald DiStassio was arrested by agents of the Federal Bureau of Investigation. He was

arraigned before a United States Magistrate and released on a $10,000 surety bond. On May 13, 1974, Frank Messenger and Ronald DiStassio appeared before the Honorable Robert C. Zampano, United States District Judge, in New Haven Connecticut. Mr. DiStassio, who was represented by attorney James McLoughlin, pled not guilty to Counts One and Two of the indictment. Mr. Messenger, who was represented by attorney Charles Hanken, pled not guilty to Count Two of the indictment.

The government filed a Notice of Readiness in the case on May 28, 1974. No pre-trial motions were filed by the defendants. A jury was impanelled and sworn on November 19, 1974 and, that same day, the government's presentation of evidence began. The government produced six witnesses and the testimony of an additional witness was stipulated to. The government rested its case on November 21, 1974, and the appropriate defense motions for acquittal were denied. The defense began its evidence that same day. Both of the defendants testified, along with three other witnesses. The defense rested on November 22, 1974. On November 26, 1974, the defendants were allowed to re-open their case in order to introduce an exhibit. The government was allowed to re-open its case and produce a rebuttal witness. Both sides then rested, and, after receiving its charges, the jury began its deliberations.

On November 27, 1974 the jury returned a verdict of guilty agaist Ronald DiStassio on Counts One and Two and against Frank Messenger on Count Two. On December 2, 1974, the defendants filed motions for judgment of acquittal or, in the alternative, for a new trial, which were denied on December 10, 1974. On March 24, 1975 Ronald DiStassio was sentenced to four years imprisonment on each count, to run concurrently and Frank Messenger was sentenced to four years imprisonment on Cout Two. This appeal followed.

Statement of Facts*

John Alicki, who at the time of trial had known Ronald DiStassio for approximately ten years (Tr. 4), began placing sports bets with DiStassio in July of 1971 (Tr. 35). By October of 1971 he owed DiStassio $1,200.00 (Tr. 4). A partial payment of $800.00 was made to DiStassio (Tr. 6, 7), in the form of a check from FCH Services, Inc., dated September 20, 1971, payable to John and Phyllis Alicki, for the sale of their interest in the Second Stoneridge Cooperative (Tr. 87). The check was endorsed by John Alicki, Phyllis Alicki, and Daniel Ricco (Tr. 6, 321). Mr. Ricco testified that DiStassio had given him the check and that he (Ricco) had cashed it for him (Tr. 424).

After reducing the debt to DiStassio to $400.00 (Tr. 8), John Alicki continued to place wagers with DiStassio and, during October, 1971, became indebted to DiStassio to the extent of $1,500.00 (Tr. 10). Alicki was unable to pay this debt (Tr. 10).

On November 18, 1971, John Alicki entered the Marine Corps (Tr. 12) and was sent to Camp Pendleton, California (Tr. 13). Alicki left Camp Pendleton, without authorization, on April 10, 1972 and returned to Bridgeport, Connecticut (Tr. 46). He was apprehended by the Federal Bureau of Investigation on October 12, 1972 and returned to the Marine Corps (Tr. 51). On March 6, 1973 he again returned to Bridgeport without authorization (Tr. 58). Alicki testified that he was not personally contacted by DiStassio, during this period, regarding the $1,500.00 debt (Tr. 13), and that the debt was still owed on October 4, 1973 (Tr. 105).

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* A review of the facts will be in the light most favorable to the Government, as required in a jury trial. *Glasser* v. *United States*, 315 U.S. 60 (1942); *United States* v. *McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972).

Phyllis Alicki, however, who had, at the time of trial, known DiStassio for eleven years (Tr. 150) and recognized his voice (Tr. 159), received six telephone calls from DiStassio between December, 1972 and March, 1973 (Tr. 160, 330). During the first two calls, DiStassio asked for her husband and Mrs. Alicki told him (DiStassio) that he wasn't home (Tr. 161, 331). During the third, fourth, and fifth calls DiStassio, after asking for John Alicki, told Phyllis Alicki that he (John Alicki) owed him money (Tr. 161, 332). Mrs. Alicki testified that she received a sixth call around the end of February, 1973, just prior to the birth of her son on March 3rd (Tr. 162, 335). In this call, Mr. DiStassio identified himself (Tr. 282, 350) and asked if her husband was home (Tr. 162, 223). Mrs. Alicki testified that she told him that she would call the police if he kept bothering her (Tr. 162, 223, 367), and DiStassio responded that if she did he would put her, her children and her husband in "cement shoes" (Tr. 162, 223, 367). Following the incident, Mrs. Alicki called her husband and asked him to return home, which he did (Tr. 224).

During the evening of October 4, 1973 Mrs. Alicki was in her home on the second floor of a two family dwelling at 546 Garfield Avenue, Bridgeport, Connecticut (Tr. 2, 3, 152, 226). Her husband was not at home (Tr. 228), but her three children were sleeping in the left rear bedroom, approximately ten feet from their garage (Tr. 227). At 11:30 p.m. Mr. Alicki heard the doorbell ring (Tr. 228). She stuck her head out of a front window and saw two men standing below on the doorstep (Tr. 228, 229). Mrs. Alicki asked who it was and one of the men said "Ronny" (Tr. 230). She asked "Ronny who?" and received the response "Rony DiStassio" (Tr. 287). DiStassio then asked if her husband was at home, and she replied "No, he is probably down at the club" (Tr. 230, 231). The second man did not participate in this conversation (Tr. 231). The two men then left the doorstep and disappeared around the side of the house in the direction of the garage (Tr. 223,

234). Mrs. Alicki testified that, other than the garage, there is nothing behind her house but hedges and a brook (Tr. 235). Approximately five minutes later, while she was still watching from the front window, the two men came back down the driveway to the street, entered a brown Cadillac, and drove away (Tr. 235). DiStassio entered the car on the passenger side and the other man entered on the driver's side (Tr. 235). Mrs. Alicki identified the defendants as the two men who had been involved in these events (Tr. 230, 233). At trial, Special Agent James P. McNamara, Federal Bureau of Investigation, Bridgeport, Connecticut testified that during October, 1973 Frank Messenger was driving a brown Cadillac (Tr. 431).

According to Mrs. Alicki, her husband returned approximately ten minutes after the two men had driven away (Tr. 236) (Mr. Alicki placed the time of his return at approximately 11:35 p.m.—Tr. 14). Mr. Alicki, upon his return, lit a cigarette and asked his wife to make coffee (Tr. 14, 236). His wife told him that "Ronny" had been there (Tr. 236). Mrs. Alicki stated that she smelled smoke (Tr. 14, 15, 236). Smoke could be smelled in the children's bedroom which overlooked the garage (Tr. 236, 237). After a search of the cellar (Tr. 237), the Alicki's found that the fire was in the garage where their car was parked (Tr. 16, 237). The fire was both inside and outside of the car (Tr. 238), which was a 1966 Buick Riviera (Tr. 19). Mr. Alicki began to use a hose on the fire and told his wife to call the fire department (Tr. 18, 237). Mrs. Alicki testified that the fire department arrived ten minutes after the discovery of the fire (Tr. 237). Mr. Alicki testified that there was extensive damage to the car and that it was subsequently junked (Tr. 18). There was no insurance on the car (Tr. 76).

Frederick Zwierlein, who was an assistant chief of the Bridgeport Fire Department, responded to the alarm and arrived at 546 Garfield Avenue at approximately 12:02 a.m.

(Tr. 383, 390). Most of the fire had already been extinguished by the time he arrived (Tr. 384). After inspecting the area, Mr. Zwierlein determined that there had been two separate fires (Tr. 385, 387, 390, 395, 398). One fire had been under the car, and one had been inside the car on the seat (Tr. 385, 396, 388). The fire under the car had not burned through into the interior (Tr. 388, 389). Paper and cardboard debris was found both under and inside the car (Tr. 388, 393, 399, 411). He reported and testified that, in his opinion, the fire was "apparently of incendiary origin" and that it was deliberately set (Tr. 389). Chief Zwierlein estimated that the fires had been set at approximately 11:45 p.m. (Tr. 407).

The Defense

The defense, in essence, was that the defendants had indeed visited the Alicki home the night of October 4, 1973, but for a different reason and at a different time than that alleged by the government. Both of the defendants testified on their own behalf (Tr. 451, 503).

Frank Messenger testified that he came to Bridgeport to have dinner with a group of people, including his son and daughter (Tr. 452), and Mr. DiStassio (Tr. 454). He arrived at the Golden Nugget Bar in Bridgeport at 6:00 or 6:30 p.m. (Tr. 466, 467). He did not recall who he met, if anyone, at the Golden Nugget (Tr. 467, 468). After staying at the Golden Nugget for approximately fifteen minutes (Tr. 468), he went to the Vanguard (Tr. 469), where he met Mr. DiStassio, his daughter Linda, his son Joseph, a Mr. Buswell, John Martone, Deloras Kistner and a friend of hers named Patty (Tr. 470-472). At approximately 7:30 p.m. this party left the Vanguard and went to the Pompeii Restaurant (Tr. 469, 472). He testified that his daughter and son accompanied him in his vehicle, a brown Cadillac (Tr. 466), on the drive to the

Pompeii (Tr. 473). They arrived at the restaurant between 7:30 and 7:45 p.m. (Tr. 475).

Following dinner, Mr. Messenger and his party went to the Mark III Lounge, arriving there between 9:30 and 9:45 p.m. (Tr. 477, 478). After ordering drinks, Messenger was told, by his daughter, that John Alicki had been calling her and asking her to go out (Tr. 456, 457, 478). He testified that she had mentioned this to him on a number of other occasions as well (Tr. 478, 479, 485-6). He claims to have ascertained, from another member of the party, that John Alicki lived on Garfield Avenue (Tr. 457, 480-481). Messenger, accompanied by DiStassio, left the bar, after having been there only five minutes (Tr. 484), to go to the Alicki home (Tr. 457, 480, 482, 485). He testified that his purpose was to tell John Alicki to leave his daughter alone (Tr. 480). After finding the Alicki residence, DiStassio rang the bell (Tr. 488), and then spoke with a woman he (Messenger) believed to be Mrs. Alicki (Tr. 488-491). Messenger gave the time of this conversation as being approximately 10:00 p.m. (Tr. 491). He testified that DiStassio asked her if John was at home and that woman replied that "he's probably down at the club" (Tr. 491). After a short discussion as to what they would do next (Tr. 492), Messenger and DiStassio returned to Messenger's car and departed (Tr. 492). Messenger testified that they stopped at the Benevento Club, did not find John Alicki there, and then returned to the Mark III (Tr. 494, 495).

Ronald DiStassio testified to knowing John and Phyllis Alicki for a considerable period of time (Tr. 505). He denied making any of the calls testified to by Phyllis Alicki (Tr. 507), and testified, in particular, that he had been in Puerto Rico from February 19th to the 27th, 1973 (Tr. 508). He also testified that he had accepted wagers from Mr. Alicki, that he had passed these wagers on to Daniel Ricco, and that John Alicki had given him a check (Gov-

ernment Exhibit A) which he (DiStassio) had passed on to Mr. Ricco to pay off a gambling debt (Tr. 516-517, 526-529). He also admitted accepting wagers from others as well as John Alicki (Tr. 532). He testified that, after receiving the check, he called the Alicki residence and asked for John; and Mrs. Alicki told him to stop calling or she would call the police (Tr. 530, 531, 532). On direct examination, however, he had given a somewhat shortened version of this call (Tr. 507). Mr. DiStassio admitted, on cross-examination, that he had denied to the Federal Bureau of Investigation that he had ever received a check from John Alicki (Tr. 545), or that Alicki had ever bet with him (Tr. 545).

Mr. DiStassio testified that he had met Mr. Messenger at the Vanguard Restaurant at about 6:30 p.m. on October 4, 1973 (Tr. 508, 537). At approximately 7:30 p.m., he arrived at the Pompeii Restaurant with Messenger's daughter and son, John Martone, two girls named Deloras and Pat, and a man named Tito (Tr. 509, 538). The party had dinner and then left, at approximately 9:30 p.m., and went to the Mark III Lounge (Tr. 509). He claimed to have told the Federal Bureau of Investigation, upon his arrest approximately five months later, that he had been at the Pompeii, but admitted that no reference to this could be found in the Federal Bureau of Investigation report (Tr. 543-544).

Shortly after their arrival at the Mark III, Mr. Messenger asked DiStassio to accompany him to attempt to find John Alicki (Tr. 512). Messenger said that Alicki had been "fooling around with his daughter" (Tr. 510). DiStassio testified that he went with Messenger, and, after finding the Alicki residence, spoke with Phyllis Alicki (Tr. 512-514, 546-548). Messenger and DiStassio then returned to the Mark III after stopping at the Benevento Club to see if Alicki was there (Tr. 515-516, 549). He

testified that they were back at the Mark III by approximately 10:30 p.m. (Tr. 516). During cross-examination, DiStassio admitted telling the Federal Bureau of Investigation that he and Messenger's visit to the Alicki home had taken place in December of 1973 (Tr. 541-542, 543).

Deloras Kistner testified that she had met Messenger at the Vanguard Restaurant on October 4, 1973 (Tr. 557), but could not remember whether she had worked there that day (Tr. 565-566). Although she was subsequently seated next to Linda Palmer, Messenger's daughter, at the Pompeii, she could not recall hearing any conversations between Linda and her father (Tr. 571). She testified that Messenger seemed in a good mood that night and was not upset (Tr. 573). She was quite certain that Messenger had left the Mark III at approximately five minutes after ten, and returned within twenty or thirty minutes (Tr. 574).

Linda Palmer testified to the same time sequence of the events on the evening of October 4th (Tr. 583, 584, 585). She also testified that she had previously told her father about phone calls from John Alicki, and that he had not been upset (Tr. 593). When asked how he had reacted when she had mentioned the matter on October 4th, she stated: "Well, he didn't react at all" (Tr. 593).

In rebuttal, the government produced Frank Messenger's son, Joseph Morano, who testified that he had not been with his father and DiStassio at the Pompeii Restaurant on October 4, 1973 (Tr. 623), and that he did not remember being with any of the individuals claimed to have been in the Messenger party that night (Tr. 624).

I.

There was sufficient evidence from which the jury could infer that Ronald Di Stassio was guilty beyond a reasonable doubt as to both counts of the indictment.

Viewing the evidence in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972), and also considering the evidence presented by the defense, *United States* v. *Tramunti*, 500 F.2d 1334, 1338 (2d Cir. 1974), there was "relevant evidence from which the jury could properly find or infer, beyond a reasonable doubt", *United States* v. *Glasser*, 443 F.2d 994, 1006 (2d Cir. 1971), *cert. denied*, 404 U.S. 851, that Ronald DiStassio was guilty of the crimes for which he was accused.

As to Count One of the indictment, without repeating the entire statement of facts, the government proved the existence of a gambling debt, an extension of credit encompassed by the statute, *See, e.g., United States* v. *Cafaro*, 455 F.2d 323 (2d Cir. 1972), *cert. denied*, 406 U.S. 918; *United States* v. *Keresty*, 334 F. Supp. 461 (W.D. Pa. 1971), *aff'd* 465 F.2d 36 (3d Cir. 1972), *cert. denied*, 409 U.S. 991, owed by John Alicki to Ronald DiStassio (Tr. 4, 10, 149). Evidence was produced that a partial payment on this debt was made by giving DiStassio a check in the amount of $800.02 (Tr. 6, 7, 87). The jury, as the judges of credibility, had the right, of course, to disbelieve his explanation that he took Alicki's wagers as a favor and simply passed them, and the check, on to another (Tr. 516-517, 526-529). This is especially true in light of his admission that he had denied these facts to the Federal Bureau of Investigation (Tr. 545). *United States* v. *Parness*, 503 F.2d 430, 438 (2d Cir. 1974).

Furthermore, there was testimonial evidence that DiStassio had called the wife of the victim on six occasions, four of which were directly related to the debt (Tr. 161, 332). DiStassio himself admitted to making one call concerning the debt (Tr. 530, 531, 532). In three succeeding calls, DiStassio told Mrs. Alicki that her husband owed him money (Tr. 161, 332), and in the sixth call, when Mrs. Alicki threatened to go to the police, DiStassio told her he would put her, her children, and her husband in "cement shoes" (Tr. 162, 223, 367).

The appellant would have this Court focus only on the sixth call and ignore that which went before. However, the threat must be viewed "in light of the totality of the government's case, since one fact may gain color from the others". *United States* v. *Tramunti, supra,* at 1338. Also the single case cited by appellant as supporting his argument has no real bearing in this situation. The statute involved in *United States* v. *Feudale,* 271 F. Supp. 115 (D. Conn. 1967), 18 U.S.C., Section 875, consists of four distinct subsections, with subsection "c" covering threats to injure the person and subsection "d" covering threats to injure reputation. The Court, in that case, found that while the government in Count One of the indictment had charged a threat to injure the person of the victim, it had only proven a threat to injure his reputation, and thus had not proven all the essential elements of the crime charged. *United States* v. *Feudale, supra,* at 118. On the other hand, 18 U.S.C., Section 894 simply prohibits the use of extortionate means (defined in Section 891(7) as "any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person") to collect or attempt to collect any extension of credit.

It is clear that the threat need not have been directed to the debtor personally, but could be made to his wife,

United States v. *Zito,* 467 F.2d 1401 (2d Cir. 1972). DiStassio's threat to Mrs. Alicki is inexorably entwined with the debt, although the appellant argues that this should be ignored simply because the call began "innocuously". However, the three previous calls all concerned the debt (Tr. 161, 332). There was no other reason advanced as to why DiStassio would be calling the Alicki home, and, in fact, DiStassio admitted that he had called once to speak to John Alicki about the debt (Tr. 530-532). The jury was certainly entitled to infer that DiStassio realized that if Mrs. Alicki brought the debt to the attention of the police it would be much more difficult, if not impossible, for him to get payment. By making such a fearful threat he could eliminate, successfully as events proved, Mrs. Alicki's only viable alternative to paying—that of going to the police.

In *United States* v. *DeStafano,* 429 F.2d 344 (2d Cir. 1970), *cert. denied,* 402 U.S. 972 (1971), an extortionist, DeBrizzi, was confronting a service station owner about a debt owed by the owner's son. When an employee started to leave to call the police, DeBrizzi told the owner to "get that bum back here, because if he is going to call the Stratford Police, * * * I'll be out on bond in five minutes. I'll come back here and make you both look like a sieve!" *Supra,* at 346. This Court, in considering the above and other events, found that:

> "All of the acts and words of appellant and DeBrizzi were, if not express threats, at the least, clearly made threatening by the circumstances or the manner in which they were uttered." *Supra,* at 346-347; *see also, United States* v. *Curcio,* 310 F. Supp. 351 (D. Conn. 1970) (nature of implicit threats).

We would argue that this same logic should be applied to this case.

As to Count Two, the appellant asks this Court to ignore the testimonial evidence of DiStassio's late night visit to the Alicki home on October 4, 1973 (Tr. 228-235); DiStassio's own testimony that he had been there that night (Tr. 512-514, 546-548); his admission that he had told the Federal Bureau of Investigation that his visit had occurred in December (Tr. 541-542, 543); and Chief Zwierlein's testimony that there were two separate and distinct fires (Tr. 385, 387, 390, 395, 398) and that they had been deliberately set (Tr. 389). Instead, he bases his argument on a portion of Chief Zwierlein's testimony, which the appellant has misconstrued, and the delay between the sixth phone call and the burning of the car.

Certainly the government did not prove, and probably could not have proved, why the appellant allowed this time to pass. Human nature is often mystifying. However, the government did prove the existence of a debt still owed on October 4th; the visit by DiStassio that night; and a fire which was discovered shortly after his departure. These factors should be sufficient. Regarding Chief Zwierlein's testimony, he gave an opinion that the fires could have been started at about 11:45 p.m. (Tr. 407). He also stated that, in his opinion, the fire underneath the car had burned itself out while the fire inside the car had continued to burn (Tr. 403-407). This explanation did not mean, as appellant contends, that the fire underneath the car was still burning when Chief Zwierlein arrived, thereby exculpating DiStassio, but rather that there was a fire burning when the firemen arrived (Tr. 406, 411). In fact, Chief Zwierlein's estimate of the time that the fires originated brings it very close to the timing of the events remembered by Mrs. Alicki (Tr. 228, 235, 236). Far from exculpating Mr. DiStassio, Chief Zwierlein's testimony proved substantial evidence from which the jury could infer that DiStassio had set the fires.

Therefore, it is the government's firm contention that there was sufficient evidence from which a reasonable mind might fairly conclude guilt beyond a reasonable doubt on both counts of the indictment.

II.

There was sufficient evidence from which the jury could infer guilty knowledge on the part of appellant Messenger.

Appellant Messenger argues that there was "no proof whatsoever" brought out at trial that he knew of the debt owed by John Alicki to Ronald DiStassio, and, therefore, that it necessarily follows that there was insufficient proof to support his conviction. The United States disagrees.

The standard for weighing sufficiency of evidence is whether "upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt". *United States* v. *Rivera*, 513 F.2d 519, 529 (2d Cir. 1975) (quoting with approval, *Curley* v. *United States*, 160 F.2d 229, 232-33 (D.C. Cir. 1947), *cert. denied*, 331 U.S. 837). This test must be applied to the totality of the government's case and not to each element. *United States* v. *Taylor*, 464 F.2d 240 (2d Cir. 1972). Regarding the nature of the evidence, this Court has stated that:

> ". . . the possible inference of a defendant's guilt may be created either by direct evidence or by circumstantial evidence. As we stated in *United States* v. *Bowles*, 428 F.2d 592, 597 (2d Cir. 1970), 'circumstantial evidence is of no less probative value than testimonial evidence. * * * The question is always whether the jury may rationally and logically infer the ultimate fact to be proved from basic facts,

> whether established by circumstantial or testimonial evidence, and the surrounding circumstances of the case'." *United States* v. *Glasser, supra,* at 1007; *see also, United States* v. *Harris,* 435 F.2d 74, 88-89 (D.C. Cir. 1970), *cert. denied,* 402 U.S. 986 (1971).

It was proved that a debt existed and was owing to DiStassio on October 4, 1973 (Tr. 4, 10, 105). It was proven that Frank Messenger was with Ronald DiStassio at the Alicki residence late that night (Tr. 233), and they walked down the driveway toward the garage after DiStassio had engaged in a short conversation with Mrs. Alicki (Tr. 233). Mrs. Alicki testified that other than the garage, there was nothing behind the house except for hedges and a brook (Tr. 234). After approximately five minutes, Messenger and DiStassio came back down the driveway and departed in Messenger's car (Tr. 235, 431, 466). Shortly thereafter, the Alicki's discovered that their car was on fire (Tr. 15-16, 237-238). Deputy Chief Zwierlein testified that there were two separate and distinct fires (Tr. 385, 387, 390, 395, 398); that they had been deliberately set (Tr. 389); and that they had originated at approximately 11:45 p.m. (Tr. 407).

In contrast, Messenger advanced a somewhat incredible story. He claimed that he had left a party of friends in order to find John Alicki and tell him to stop bothering his daughter (Tr. 456, 493). He claims to have done this because Alicki had asked his daughter out (Tr. 456). This claim must be viewed, however, in light of the facts that his daughter was unmarried at the time (Tr. 456); that she had told him of this on several other occasions, but that this time she seemed more "sincere" (Tr. 479); that he was in a good mood that night (Tr. 573), and did not seem upset by what his daughter told him (Tr. 587, 593); that the witnesses all recalled specific times with certainty, but were vague as to preceding or subsequent activities; that Messenger testified his son was with him at the Pompeii Restaurant, and his son's contrary testimony (Tr. 454, 472,

476, 623); and Mr. DiStassio's admission that he had told the F.B.I. that he and Messenger had visited the Alicki home in December of 1973 (Tr. 541-542, 543), but that no reference to the Pompeii Restaurant or any of the supposed witnesses could be found in the F.B.I. report (Tr. 543-544). The jury, of course, had the right to not believe Messenger's version of the events on the night in question. *See, e.g., United States* v. *Tramunti, supra,* at 1338; *see also, United States* v. *Weinstein,* 452 F.2d 704, 713-714 (2d Cir. 1971), *cert. denied, Grunberger* v. *United States,* 406 U.S. 917 (1972).

The standard for aiding and abetting, in this Circuit, is that "the defendant must associate himself with the venture in some fashion, 'participate in it as something he wishes to bring about,' or 'seek by his action to make it succeed'." *United States* v. *Johnson,* 513 F.2d 819, 823 (2d Cir. 1975) (quoting *United States* v. *Peoni,* 100 F.2d 401, 402 (2d Cir. 1938)). The proof, of course, must encompass the same elements required to convict the principal. *Hernandez* v. *United States,* 300 F.2d 114, 123 (9th Cir. 1962). The appellant claims that there is no evidence that Messenger knew of the debt, and therefore, of the purpose for burning the car. This argument ignores, however, the basic premise that "guilty knowledge" may be inferred from the evidence and the circumstances. *See, United States* v. *Gallishaw,* 428 F.2d 760, 763 (2d Cir. 1970); *United States* v. *Barlow,* 470 F.2d 1245, 1249 (D.C. Cir. 1972); *United States* v. *Moody,* 462 F.2d 1307, 1308 (8th Cir. 1972) ("It is axiomatic . . . that subjective knowledge can be proven only by inferences from objective circumstances").

In *United States* v. *Garguilo,* 310 F.2d 249 (2d Cir. 1962), this Court stated:

> "[E]vidence of an act of relatively slight moment may warrant a jury's finding participation in a crime. Thus it would have been enough here if the

> government adduced evidence from which the jury could find, in addition to guilty knowledge, that Macchia had carried the negative or *driven the car*. . . . There may even be instances where the mere presence of a defendant at the scene of a crime he knows is being committed will permit a jury to be convinced beyond a reasonable doubt that the defendant sought by his action to make it succeed . . ." *Supra*, at 253 (emphasis added), *see, also, United States* v. *Wisniewski*, 478 F.2d 274, 279 (2d Cir. 1973).

Although the evidence in *Garguilo* rested only on repeated presence and an unusual introduction, the Court intimated that it might have found the evidence sufficient had the trial judge instructed properly. *Supra*, at 254. Chief Judge Lumbard, concurring and dissenting, made it clear that he would have had no hesitation about finding the evidence sufficient. *Supra*, at 255. Courts have, in the past, reversed many cases in which the only evidence was that of mere *coincidental* presence, and thus nothing from which to infer guilty knowledge. *See, e.g., United States* v. *Vilhotti*, 452 F.2d 1186 (2d Cir. 1971), *cert. denied, Maloney* v. *United States*, 405 U.S. 1041 (1972). In *United States* v. *Cirillo*, 499 F.2d 872, 884-87 (2d Cir. 1974), this Court reversed two narcotics convictions where the only independent, non-hearsay evidence were meetings with other defendants with no evidence of what was discussed and no suspicious surrounding circumstances. *See, also, United States* v. *Minieri*, 303 F.2d 550, 537 (2d Cir. 1962). The common factor in all these cases is that there was no evidence, outside of mere presence, that a jury could use to infer knowledge and, thereby, guilt.

In contrast, however, is *United States* v. *Bryant*, 461 F.2d 912 (6th Cir. 1972):

> "In this case, the jury would have been justified in inferring that Burnis Bryant intended to facilitate

> his brother's violation of the federal liquor tax laws from the following facts: the blood relationship between the two men; Burnis' operating the car in which his brother transported a five-gallon whiskey container; and the delivery of the container to the back door of Brown's apartment. This evidence upon a proper instruction to the jury, would have warranted a finding that Burnis Bryant knew what his brother was doing and intended by his actions to make his brother's illegal venture succeed." *Supra,* at 920.

The Court went on to say that:

> "Intent, like willfulness or premeditation, is a subjective element the existence of which usually must be inferred from evidence of overt acts." *Supra,* at 921.

The Third Circuit has also recently dealt with this issue, and, regarding knowledge, has stated:

> "Because such awareness is usually difficult to prove directly, courts have allowed inference of such awareness to be drawn from other circumstances; and, in turn have allowed this inference to serve as a basis for finding the necessary intent to aid and abet. Evidence of 'collaboration' or 'association' between the principal and his aides may be used to infer the aider's awareness of the principal's intent." *United States* v. *Cades,* 495 F.2d 1166, 1169 (3d Cir. 1974).

Also, the evidence need not point with absolute certainty to knowledge on the part of the aider and abettor, but must simply be "sufficient for a reasonable juror, who had seen and heard the witnesses, to be convinced of this beyond a reasonable doubt". *United States* v. *Rivera, supra,* at 530. Nor is it necessary that the aider and abettor have an active stake in the outcome of the crime, so long as

there is participation in it. *United States* v. *Harris,* 441 F.2d 1333, 1336 (10th Cir. 1971).

It should be noted that in the two principal cases cited by appellant in support of his position the deciding factor was *not* whether there was sufficient evidence from which the jury could infer guilty knowledge, but rather the crucial factor was that the trial judge had improperly instructed the jury. In both *United States* v. *Short,* 493 F.2d 1170, 1171-72 (9th Cir. 1974), and *United States* v. *Gallishaw, supra,* at 762-763, the Courts failed to properly instruct the jury that knowledge is an essential element, and that an aider and abettor must be aware of the kind of criminal conduct contemplated or participated in. Here Judge Zampano not only gave the usual aiding and abetting charge (Tr. 698), but he also gave a *Garguilo* charge (Tr. 699), *see, United States* v. *Terrell,* 474 F.2d 872, 876 (2d Cir. 1973). He also gave two supplemental charges which stressed the need for knowledge as an essential element in order to convict (Tr. 725-727, 732-733).

In this case, the government proved a debt. It proved that on the night of October 4, 1973, Frank Messenger drove Ronald DiStassio to the home of the debtor; that Messenger came up to the house with DiStassio; that they went around the side of the house toward the garage; that when they reappeared Messenger drove DiStassio away; and that shortly thereafter the debtor's car was found on fire. These facts do not show mere coincidental presence, they show purposeful activity. These acts are not innocent; the burning of another person's car is clearly wrongful and illegal. From these acts, the jury could, and did, infer that Frank Messenger knew that the purpose of the visit was to attempt to collect a debt, and that he acted with such knowledge. Chief Judge Lumbard once stated that:

> "[W]hen two men join together to commit a single robbery, one may infer from their common partici-

pation in the robbery that they have conspired to commit the robbery." *United States* v. *Aviles*, 274 F.2d 179, 189 (2d Cir. 1960).

That same logic is applicable in this case.

Based on the above stated reasoning and authorities the government submits that there was sufficient evidence from which a reasonable mind might reasonably infer guilty knowledge on the part of Appellant Messenger and fairly conclude guilt beyond a reasonable doubt on Count Two of the Indictment.

CONCLUSION

The United States respectfully suggests that this case simply involves closely contested factual issues and the weighing of credibility, the resolution of which should remain the jury's prerogative, and therefore, based on the reasoning and authorities stated herein, the judgments of conviction should be affirmed.

Respectfully submitted,

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United States Court of Appeals
FOR THE SECOND CIRCUIT

No.

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at ~~914 Brooklyn Avenue~~ Brooklyn, New York 11203

That on the 4th day of August - 1975, deponent served the within Briefs for the appellee upon Charles Hanken, Esq., 1330 Fairfield Avenue, Bridgeport, Conn. James P. McLoughlin, Esq. 285 Golden Hill, Bridgeport, Ct. T. George Gilinsky, Chief, Appellate Section, Criminal Division, Washington, D.C.

Attorney(s) for the _____ in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Sensale

Sworn to before me,

This 4 day of AUGUST 1975

William J. Bachman

WILLIAM J. BACHMAN
Notary Public, State of New York
No. 30-5137735
Qualified in Nassau County
Commission Expires March 30, 1976